108-281

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 227.

JOHN D. WRIGHT, THOMAS B. TUCKER, W. O. BENNETT, J. M. BASS, EXECUTOR OF W. H. WELLS, DECEASED, F. M. BASS, AND G. W. BENNETT, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED MAY 27, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 227.

JOHN D. WRIGHT, THOMAS B. TUCKER, W. O. BENNETT, J. M. BASS, EXECUTOR OF W. H. WELLS, DECEASED, F. M. BASS, AND G. W. BENNETT, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the middle district of Tennessee, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court before you, between John D. Wright, Thomas B. Tucker, William O. Bennett, J. M. Bass, as executor of the last will and testament of W. H. Wells, dec'd, plaintiffs in error, and F. M. Bass and G. W. Bennett, sureties upon their bond for writ of error, and The United States, defendants in error, a manifest error hath happened to the great damage of the said John D. Wright, Thomas B. Tucker, William O. Bennett, J. M. Bass, executor, &c., F. M. Bass, and G. W. Bennett, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the

2 second *second* Monday in October, A. D. 1880 next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of October, in the year of our Lord eighteen hundred and seventy-nine, and of the Independence of the United States the 103d year.

[SEAL.] LEWIS T. BAXTER, *Clk,*
Clerk of the Circuit Court of the United States
for the Middle District of Tennessee.

Allowed. Nash'ille, Ten'essee, April 27th, 1880.
JNO. BAXTER,
U. S. Circuit Judge for the 6th Circuit.

3 THE UNITED STATES OF AMERICA, *ss:*

To James A. Warder, U. S. district attorney for the middle district of Tennessee:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October (1880) next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein John D. Wright, Thomas B. Tucker, W. O. Bennett, J. M. Bass, as executor of the last will and testament of W. H. Wells, dec'd, F. M. Bass, and G. W. Bennett are plaintiffs in error and The United States are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this the 20th day of October, A. D. 1879.

JNO. BAXTER,
U. S. Circuit Judge for the Sixth Circuit.

4 I hereby acknowledged service of the foregoing citation April 27th, 1880.

JAMES A. WARDER,
U. S. Attorney.

5 *Assignment of errors.*

Supreme Court of the United States.

JOHN D. WRIGHT, T. B. TUCKER, J. M. BASS, ex'r W. H. Wells, dec'd, F. M. Bass, and G. W. Bennett,
vs.
THE UNITED STATES.
} Conk., 876. In error.

Of the October term in the year of our Lord one thousand eight hundred and seventy-nine.

Afterwards, to wit, on the second Monday of October of this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John D. Wright, T. B. Tucker, J. M. Bass, executor of the last will and testament of W. H. Wells, dec'd, F. M. Bass, and G. W. Bennett, by , their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

6 The district judge charged the jury on the trial in the district court that the endorsement made by said Wright and Tucker upon the original report of the survey of their distillery was a waiver of their right to a copy of said report of survey; and that defendants were liable for deficiencies in the production of spirits although they had no copy of the survey; and the said district court gave judgment in favor of the said United States against said defendants; and the said circuit judge, upon the trial before him, held that there was no error in this, and affirmed said judgment of the district court; and there is also error in this, that by the record aforesaid it appears that the judgment aforesaid was given for said United States against said Wright and others, whereas by the law of the land the said judgment ought to have been given for the said Wright and others against the said United States; and the said Wright and others, plaintiffs in error, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing; and that they may be restored to all things which they have lost by reason of said judgment, &c.

7 R. McPHAIL SMITHSON,
Attorney for Plaintiff in Error.

8 *Copy of record.*

JOHN D. WRIGHT ET AL.
vs.
THE UNITED STATES.

April term, 1879.

MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States for the district aforesaid, began and held in the Federal court-room, in the city of Nashville, on the 3d Monday, being the 21st day of April, A. D. 1879, and of the Independence of the United States the 103 year.

Present, the Hon'l. John Baxter and C. F. Trigg, judges.

The following proceedings were had:

On the 19th day of April, 1879, a transcript was filed from the district court of the United States in the case of the United States vs. John D. Wright et , which is in the words and figures following, to wit:

On the 29th day of March, 1875, a declaration was filed, which is as follows:

District court of the United States for the middle district of Tennessee.
April term, 1875.

The United States of America, by A. M. Hughes, their attorney for said district, complains of John D. Wright, Thomas B. Tucker, Wm.
9 H. Wells, and William O. Bennett, citizens of the State of Tennessee, who are in court by summons to answer the plaintiff of a plea that they render to said plaintiff the sum of one thousand dollars which they owe to the plaintiff, and from them wrongfully detain. For that whereas, heretofore, to wit, on the 12th day of Sept., 1873, at the district aforesaid, the said defendants, by their certain writing obligation, sealed with their seals, and now here to the court shown, the said John D. Wright and Thomas B. Tucker, as principals, and the other defendants as sureties, acknowledged themselves to be held and firmly bound unto the said plaintiff in the full and just sum of one thousand dollars, to the payment whereof, well and truly to be made, they jointly and severally bound themselves, their heirs, executors, and administrators, firmly by said presents, the conditions of which said writing obligatory was that whereas the said John D. Wright and Thomas B. Tucker intended, on and after the 25th day of Sept., 1873, to be engaged in the business of distillers within the 4th collection district of Tennessee, to wit, near Bunker Hill, situated in the county of Giles and State aforesaid: Now, therefore, if the said John D. Wright and Thomas B. Tucker should, in all respects, faithfully comply with all the provisions of law in relation to the busi-
10 ness of distillers, and should pay all penalties incurred and fines imposed on them for a violation of any of said provisions, and should not suffer the lot or tract of land on which the distillery stands or any part thereof or any part of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time which they should carry on said business, then the said obligation should be void; otherwise

it was to remain in full force; which said writing obligatory was delivered to the said plaintiff and accepted by them. Yet the said defendants John D. Wright and Thomas B. Tucker did not faithfully comply with all the provisions of law in relation to the said duties and business of distillers, according to the conditions of the said writing obligatory, but failed to do so, in this, that they failed to pay certain assessments made against them as distillers by the assessor of said collection district on the March & June lists, 1874, for deficiencies in the production of spirits in the months of November & December, 1873, amounting, in the aggregate, to the sum of $607.49, said assessments having been made under and by virtue of the internal revenue laws of the United States. Yet the said defendants, although often requested to pay the said sum of money above mentioned, have hitherto wholly neglected and refused to pay the same or
11 any part thereof, and still neglect and refuse, to the damage of the plaintiff $1,000.00 Hence suit.

A. M. HUGHES,
U. S. Dist. Att'y.

On the 29th day of March, 1875, a summons was issued, which is as follows:

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon John D. Wright, Thomas B. Tucker, Wm. H. Wells, and William O. Bennett, citizens of the State of Tennessee, if to be found in your district, to be and appear before the judge of the district court of the United States for the middle district of Tennessee, at the Federal court-room, at Nashville in said State, on the third Monday in April next, then and there to answer the United States of a plea that they render unto the plaintiff one thousand dollars, which they owe to and from the said plaintiffs detain, to the damage of the said plaintiff one thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon'l. Connally F. Trigg, judge of said court, and the seal thereof, at Nashville, this the 29th day of March, in the year
12 of our Lord 1875, and of the Independence of the United States the 99th.

[SEAL.] E. R. CAMPBELL, *Clerk.*

This summons was issued on the 29th day of March, 1875.

E. R. CAMPBELL, *Clk.*

Returned not executed for want of time.

WM. SPENCE, *U. S. M.*

On the 30th day of June, 1875, an alias summons was issued, which is as follows:

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby again commanded to summon John D. Wright, Thomas B. Tucker, William H. Wells, and William O. Bennett, citizens of the

State of Tennessee, if to be found in your district, to be and appear before the judge of the district court of the United States for the middle district of Tennessee at the Federal court-room, at Nashville, in said State, on the third Monday of October next, then and there to answer the United States of a plea that they render unto them the sum of one thousand dollars, which they owe to and from them wrongfully detained, to their damage one thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Connally F. Trigg, judge of said court, and
13 the seal thereof, at Nashville, this the 30th day of June, in the year of our Lord 1875, and of the Independence of the United States the 99th.

E. R. CAMPBELL, *Clerk.*

This summons was issued on the 3d day of June, 1875.

E. R. CAMPBELL, *Clerk.*

Came to hand same day issued, and executed on the within-named defendants, by making known to them the contents of this summons, and at the same time delivering to each of them a copy of the declaration, this August 18, 1875.

WM. SPENCE, *U. S. M.*,
By S. M. KING, *D. M.*

On the 2nd day of November, 1875, the following pleas were, by leave of the court, filed by the defendants:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. WRIGHT, THOMAS B. TUCKER, WM. H. WELLS, and WILLIAM O. BENNETT, defendants.

District court of the United States for the middle district of Tennessee.
Octo. term, A. D. 1875.

And the said defendants, by their attorney, N. Smithton, comes and defend' the wrong and injury when and where, &c., and say that they do not owe the said plaintiff the said sum of money in the above dec-
14 laration above demanded of them, nor any part thereof in manner and form as said plaintiffs have above thereof complained against them, and of this the said def'ts put themselves upon the country.

SECOND PLEA—And for further plea on this behalf these defendants say that they have paid to the proper officer said sum of money sued for in this action before the commencement of this suit, and this they are ready to verify.

THIRD PLEA—And for further plea on this behalf these defendants say that the said John D. Wright and Thomas B. Tucker, did, in all respects, faithfully comply with all the requirements of law in relation to the business of distilling, and did pay all penalties incurred and fines imposed upon them for violation of any of the said provisions, and did not suffer the lot or tract of land, on which their distillery stood, nor any part

thereof, nor any of their distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which they carried on said business, according to the form and effect of said writing obligatory in the declaration mentioned and described; and of this the said defendants put themselves upon the country.

Third PLEA.—And for further plea on this behalf these defendants say that, while said Wright and Tucker were engaged in carrying on said business of distillers, during the month' of October, November,
15 and December, 1873, one Robert E. Buchanan, an internal revenue storekeeper, was duly assigned to the distillery warehouse of said Wright and Tucker, and that said Buchanan, as such storekeeper, had controle and custody of said warehouse and distillery during said months, and that said Buchanan, while he had controle and custody of said warehouse and distillery, as such storekeeper, as aforesaid, during said months refused to allow said Wright & Tucker to mash any mash into their mash-tubs, or to run, operate, or use their said distillery or any part thereof on any Saturday in said month', but, on the contrary, prevented them from doing so, and compelled said Wright and Tucker to stop and suspend any and all operations at and with their said distillery, and each and every part thereof from each and every Friday night in said months of October, November, and December, 1873, until the following Monday morning of each and every week during the said months, by reason whereof said Wright and Tucker were prevented from distilling and making the quantity required by law; and these defendants plead and rely upon the facts set forth in this plea, in bar of the plaintiffs' action for any and all taxes assessed for deficiencies here sued for, and this they are
16 ready to verify.

FIFTH PLEA.—And for a further plea in this behalf, as to a portion of the taxes assessed against said Wright and Tucker as such distillers, and sued for in this action; that is to say, one item of $53.36 purporting to have been assessed upon the March list, 1874, for deficiencies for October, 1873, these defendants say that the bond of said Wright and Tucker, as such distillers, was approved Octo. 27, 1873, and that in the five remaining days in October, 1873, one was Sunday, and that only three working days of Oct., 1873, remained after the approval of the bond, and they were therefore not liable for any taxes during the month of Octo., 1873, and this they are ready to verify; wherefore they pray judgment, &c.

SIXTH PLEA.—And for a further plea in this behalf these defendants say that no copy of the survey of the distilling of Wright & Tucker was ever delivered to them or either of them, as required by law, and that for this reason they, the defendants, are not liable for the supposed deficiencies in the productions of spirits mentioned and set forth in the declaration, and of this they put themselves upon the country.

N. SMITHTON,
Att'y for Def'ts.

17 I do solemnly swear that the foregoing pleas are not filed for delay, but that justice may be done.

N. SMITHTON.

Sworn to & subscribed before me, this Nov. 2, 1875.

E. R. CAMPBELL, *Clerk.*

Replication and issue as to all the pleas except the fourth plea, which is stricken out by the court.

A. M. HUGHES, *U. S. Att'y.*

Bond.

Know all men by these presents, that we, John D. Wright and Thomas B. Tucker, as principals, and Williams H. Wells and William O. Bennett, all of Bunker Hill, Giles County, Tennessee, as sureties, are held and firmly bound unto the United States of America, in the just and full sum of one thousand dollars, money of the United States, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 12' day of Sept., A. D. 1873.

The condition of the foregoing obligation is such that whereas the said John D. Wright and Thomas B. Tucker, now or entered on and after the 25th day of September, 1873, to be engaged in the business of a
18 distiller within the 4th collection district of the State of Tennessee, to wit, at registered distillery No. 208, situated near the town of Bunker Hill, county of Giles, and State aforesaid.

Now, therefore, if the said John D. Wright and Thomas B. Tucker shall in all respects faithfully comply with all the provisions of law in relation to the duties and busi'ess of distillers, and shall pay all penalties encurred or fines imposed on them for a violation of any of said provisions, and shall not suffer the lot or tract of land on which the distillery stands or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which they shall carry on said busi'ess, then this obligation shall be void; otherwise to remain in full force.

JOHN D. WRIGHT. [SEAL.]
THOMAS B. TUCKER. [SEAL.]
WILLIAM H. WELLS. [SEAL.]
WILLIAM O. BENNETT. [SEAL.]

Signed, sealed, & delivered in presence of—
C. H. BENNETT.
J. H. MORRIS.

I hereby certify that the within bond is properly filled up and executed, that the sureties thereon are in my opinion sufficient, and I approve the same.

Octo. 27, 1873.

J. W. C. BRYANT,
Collector 4th Dist. Tennessee.

19 *Assessment lists sued on.*

M'ch	list,	1874.	Wright & Tucker, Bunker Hill, deficiency, Nov., 1873.....					324	10
"	"	"	"	"	"	"	" & excess, Oct., 1873..	53	36
"	"	"	"	"	"	"	distilled spirits, 290 galls., @ 70c.....	203	00
June	"	"	"	"	"	"	deficiency, Dec'r, 1873, ...	230	00

On the 9th day of November, 1876, an entry was made on the minutes, which is as follows:

THE UNITED STATES
vs.
JOHN D. WRIGHT ET ALS.

Came the attorney of the United States and the defendants by their attorney, and came also a jury of good and lawful men, to wit: P. P. Peck, W. T. Wright, Geo. T. Lewis, Wm. Lellyett, A. Diehl, S. Zucurrillr, W. J. Clurbun, J. H. Currey, W. M. Noel, M. Burns, jr., J. W. Hagan, and P. G. Hursey, who being elected, tried, and sworn well and truly to try the issues joined, after hearing the evidence and the argument of counsel, were respited until to-morrow morning at 10 o'clock.

On the 10th day of November, 1876, an entry was made on the minutes, which is as follows:

THE UNITED STATES
vs.
JNO. D. WRIGHT ET AL.

Came again the attorney of the United States and the defendants, by their attorney, and came again also the same jury heretofore
20 empanneled in this cause, who, after hearing the evidence, upon their oaths do say that they find the issue in favor of the defendants.

It is therefore considered by the court that the defendants go hence without day.

On the 11th day of November, 1876, an entry was made on the minutes, which is as follows:

THE UNITED STATES
vs.
JOHN D. WRIGHT.

Came the attorney of the United States and the defendants, by their attorney, and the said attorney of the United States presented to the court his bill of exceptions to the rulings of the court at the trial of this cause, which was signed and sealed by the court and ordered to be made a part of the record of this cause.

On the 11th day of November, 1876, a bill of exceptions was filed, which is as follows:

District court of the United States for the middle district of Tennessee.

THE UNITED STATES
vs.
JOHN D. WRIGHT, THOMAS B. TUCKER, W. H. Wells, and Wm. O. Bennett.

This cause was, this 10' day of November, 1876, tried by and
21 before the Hon. Connally F. Trigg. Upon the trial evidence was

introduced tending to show that there was a survey of the distillery belonging to the defendant Wright & Tucker by J. W. C. Bryant, internal revenue assessor, at the request of said Wright & Tucker, on the 3d day of April, 1873, and a full and complete report of the survey made out in accordance with law; which report of survey was produced on the trial of this cause by J. W. C. Bryant, collector of internal revenue, and that on the 12th day of Sept., 1873, and on the day the defendants executed the bond mentioned in the pleadings, they signed the following endorsement written upon said report of survey, to wit: "We hereby accept the within survey, and consider the same as binding upon us on and after this date, this Sept. 12, 1873. John D. Wright, Thomas D. Tucker." That Wright and Tucker signed said endorsement on the instance of J. H. Morris, an assistant assessor of internal revenue, who filed the same in the assessor's office; that said Wright and Tucker did not read said survey or know the contents; that the assessed capacity of their distillery was about thirty-two gallons per day; that they did not know at what capacity they were assessed, and that no copy of said survey was ever delivered to said Wright and Tucker, or either of them, and that they never had a copy thereof.

22 Thereupon the court charged the jury, among other things not excepted to, as follows:

If no copy of the survey of said distillery was furnished to the distillers Wright & Tucker, these defendants would not be liable for any deficiencies in the production of spirits by said defendants, and that said endorsement on the survey by the defendants Wright & Tucker was not a waiver of their right to a copy of said survey.

To which charge of the court the plaintiff then and there excepted, and tendered this their bill of exceptions, which is signed, sealed, and filed, and made a part of the record in this cause.

CONNALLY F. TRIGG, *Judge, &c.* [SEAL.]

On the 17th day of April, 1878, an order was made in the circuit court of the United States, which is as follows:

THE UNITED STATES }
vs.
JOHN D. WRIGHT ET ALS. }

In this cause the death of the defendant W. H. Wells was suggested and admitted in open court, and thereupon, by consent of parties, this suit is revived in the name of J. M. Bass, as the executor of the last will and testament of the said W. H. Wells, dec'd. This cause was then heard before the Hon. John Baxter, judge, &c., upon a transcript of the record

23 from the district court of the United States for the middle district of Tennessee, and upon the assignment of errors, &c. And it appearing to the court that there is error in the record, and that the endorsement of the defendants upon the original survey of their distillery set forth in the record was a waiver of their rights to a copy thereof, it is therefore considered by the court that the plaintiffs, the United States, recover of the defendants John D. Wright and Thomas B. Tucker, as principals, and W. O. Bennett and J. M. Bass, as executor' of the will and testament of said W. H. Wells, dec'd, the sum of six hundred and seven dollars and forty-

nine cents, principal in the declaration mentioned, together with the further sum of one hundred and thirty-five dollars and twenty-six cents, interest thereon since the 1st day of July, 1874, making in all the sum of $742.75, and the costs of this cause, for which execution will issue, to be levied of the goods and chattels, lands and tenements, of Jno. D. Wright and Thomas B. Tucker and W. O. Bennett, and of the goods and chattels, rights and credits, of said W. H. Wells, dec'd, in the hands of J. M. Bass, to be administered, if any such there be, but nothing in this judgment shall conclude or estop the said Bass to show that he has no assetts with which he is chargeable with as executor, or the claim of the gov-
24 ernment against him under its penalty.

On the 18th day of April, 1878, an order was entered in the circuit court, which is as follows:

THE UNITED STATES }
vs.
JNO. D. WRIGHT ET ALS. }

This cause was this day, April 18th, 1878, further heard before the Hon'l. John Baxter, judge, &c., and it is, for good and sufficient reasons, *it is* ordered that the order and judgment rendered in this cause on yesterday is vacated, set aside, and for nothing held, and thereupon this cause was further heard upon a transcript of the record from the district court of the United States for the middle district of Tennessee, and upon an assignment, &c., of errors. And it appearing to the court that there is error in the record, and *that* the endorsement of the defendants upon the original report of survey, it is therefore considered that the judgment of the said district court be reversed, and that this cause be remanded to said district court to be further proceeded with.

On the 7th day of November, 1878, a judgment was rendered, which is as follows:

THE UNITED STATES }
vs.
JOHN D. WRIGHT ET AL. }

Came the attorney of the United States and the defendants, by
25 their attorney, and the death of the defendant W. H. Wells was suggested, proven, and admitted, and by consent this cause is revived in the name of J. M. Bass, executor of said W. H. Wells, dec'd; and thereupon came a jury of good and lawful men, to wit, H. L. Cluborne, P. P. Peck, John Johns, M. Hare, W. P. Hurley, Jno. McClellan, W. Matt. Brown, Jno. Kirkman, C. Aultman, W. J. Hamer, B. Wright, & H. A. Huntington, who being elected, tried, and sworn well and truly to try the issue joined, after hearing the evidence, the argument of counsel, and the charge of the court, upon their oaths, do say that they find the issues in favor of the United States, and assess the damages sustained by reason of the non-performance of the undertakings in the declaration mentioned at the sum of $771.09. It is therefore considered by the court that the United States recover of the defendants Jno. D. Wright, Tho's

B. Tucker, and W. O. Bennett, and of the goods and chattels, rights and credits which were of the said W. H. Wells, dec'd, in the hands of J. M. Bass, executor, to be administered, $1,000.00, the debt in the declaration mentioned to be discharged by the payment of the damages aforesaid by the jury aforesaid assessed, and the costs of this suit, for which let fi. fa. issue.

On the day of Nov., 1878, an order was entered, which is as follows:

26 THE UNITED STATES
vs.
JNO. D. WRIGHT ET ALS.

Came the parties, by their attorneys, and tender'd to the court their just bill of exceptions to the rulings of the court at the trial, which was signed and sealed by the court, and ordered to be made a part on the record in the cause.

On the 7th day of November, 1878, a bill of exception was filed, which is as follows:

District court of the United States for the middle district of Tennessee.

THE UNITED STATES
vs.
JOHN D. WRIGHT, THOMAS B. TUCKER, J. M. Bass, executor of the estate of W. H. Wells and W. O. Bennett.

This cause was on this the 7th day of November, 1878, tried by and before honorable Connally F. Trigg, judge of said court, and a jury.

Upon the trial evidence was introduced tending to show that there was a survey of the distillery belonging to the defendants, Wright & Tucker, by J. W. C. Bryant, internal revenue assessor, at the request of said Wright & Tucker, on the 3d day of April, 1873, and a full and complete survey made out in accordance with the law, which report of survey was produced on the trial of this cause by said J. W. C. Bryant, now a
27 deputy collector of internal revenue, and that on the 12th day of September, 1873, and on the day the defendants executed the bond mentioned in the pleadings, they signed the following endorsement written upon the said report of survey, to wit: "We hereby accept the within survey, and consider the same as binding upon us on and after this date, this Sept. 12, 1873. John B. Wright, Thomas B. Tucker." That said Wright and Tucker sign'd said endorsement at the instance of J. H. Morris, an assistant assessor of internal revenue, who filed the same in the assessor's office; that said Wright and Tucker did not read said survey nor know its contents; that the assessed capacity of their distillery was about thirty-two gallons per day; that they did not know at what capacity they were assessed, and that no copy of said survey of their distillery was ever delivered to said Wright and Tucker, or either of them, and that they never had a copy thereof.

Evidence was also introduced tending to show that said Wright and

Tucker were assessed on the March list, 1874, for excess of grain used, and deficiency in the production of spirits in October, 1873, $53.36. Deficiencies in the production of spirits in November, 1873, $324.10.

28 Distilled spirits, 290 gallons *@* 70c., $203.00; and that they were assessed on the June list, 1874, for deficiencies in the production spirits in December, 1873, $230.03; and that afterwards and before the commencement of this suit the item of $203.00 tax on the distilled spirits was paid to said Morris, then a deputy collector, which item is not sued for in this action. There was no evidence that notice had been given and demand made as required by revenue statutes, sections 3184 & 3185. Thereupon the court charged the jury, among other things not excepted to, as follows:

On a former trial of this cause I charged the jury that if no copy of the survey of said distilling was furnished to the distillers, Wright and Tucker, these defendants would not be liable for any deficiencies in the production of spirits by said distillers, and that said endorsement upon said survey by the defendants, Wright and Tucker, was not a waiver of their rights to a copy of said survey, and I still adhear' to that opinion (see Peabody vs. Stark, 16 Wallace, 204), but the United States having taken this case to the circuit court, and the circuit judge having held that the endorsement made by said Wright & Tucker upon the original report of sur-

29 vey of their distillery was a waiver of their rights to a copy thereof, his decision is binding upon me. And I therefore charge you in accordance with this opinion of the circuit court that said endorsement upon the original report of the survey signed by Wright & Tucker was a waiver of their right to a copy thereof, and that the defendants are liable for deficiencies in the productions of spirits though they had no copy of the survey, to all of which the defendants then and there tendered this their bill of exceptions, which is signed and sealed, filed and made a part of the record in this cause.

It not appearing that demand and notice were made and given as required by Revised Statutes, sections 3184 and 3185, if you find for the plaintiff you will compute interest on the taxes assessed on the March list, 1874, from the 31' day of March, 1874, and interest on those assessed on the June list, 1874, from the 30th day of June, 1874, and in both instances you will compute interest at the rate of six per cent. per annum.

To which charge as to the interest the United States then and there excepted and tender this their bill of exceptions, which is signed, sealed, and filed and made a part of the record in this cause, Nov. 7, 1878.

CONNALLY F. TRIGG, *Judge.* [SEAL.]

30 We waive service of citation in this cause.

N. SMITHTON,
Att'y for Def'ts.
JAS. A. WARDER,
U. S. Att'y.

On the 18th day of November, 1878, an appeal bond was filed, which is as follows:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. WRIGHT, THOMAS B. TUCKER, W. O. Bennett, and J. M. Bass, executors of W. H. Wells, dec'd, defendants.

Know all men by these presents that we, John D. Wright, Thomas B. Tucker, Wm. O. Bennett, J. M. Bass, executor of the last will and testament of W. H. Wells, dec'd, T. M. Bass, and George W. Bennett are held and firmly bound unto the United States in the sum of fifteen hundred and forty-two dollars and eighteen cents; to the payment of which well and truly to be made we, the said John D. Wright, Thomas B. Tucker, William O. Bennett, F. M. Bass, and G. W. Bennett, bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, and for the payment of which I, J. M. Bass, as such executor, bind the assets of the estate of the said W. H. Wells (but do not bind myself personally or individually) firmly by these presents.

Sealed with our seals, and dated on this the 18th day of November, A. D. 1878.

31 The condition of this obligation is such that whereas the above bounde*d* Thomas B. Tucker, John D. Wright, William O. Bennett, and J. M. Bass, as the executor of the last will and testament of the said William H. Wells, dec'd, have procured a writ of error to the circuit court of the United States for the middle district of Tennessee to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the middle district of Tennessee.

Now, therefore, if the said John D. Wright, Thomas B. Tucker, William O. Bennett, and J. M. Bass as such executor, shall prosecute to effect their said writ of error and answer in damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN D. WRIGHT, [SEAL.]
By N. SMITHTON, *Attorney.*
T. B. TUCKER. [SEAL.]
W. O. BENNETT. [SEAL.]
J. M. BASS, [SEAL.]
Executor of the Will of W. H. Wells, dec'd.
F. M. BASS. [SEAL.]
G. W. BURNETT. [SEAL.]

Signed, sealed, and delivered in my presence November 18, 1878.
C. W. MERRILL,
U. S. Circuit Court Commissioner.

32 The President of the United States of America to the judge of the district court of the United States for the middle district of Tennessee, greeting:

Because as in the record and proceedings, as also in the rendition of a judg-

ment in a plea which is in the said district court of the United States for the middle district of Tennessee, before you, between the United States of America and John D. Wright, Thomas B. Tucker, W. O. Bennett, and J. Bass, executor of W. H. Wells, dec'd, a manifest error hath happened, to the great damage of the said United States of America, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded that if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the middle district of Tennessee, together with this writ, so that you have the same at Nashville, in said district,
on the 3d Monday in April next, in the said circuit court, to be
33 then and there tried; that the records and proceedings aforesaid be,
inspected by the said circuit court, may cause further to be done to correct that error, which of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 8th day of November, A. D. 1878, and of the Independence of the United States the 103 year.

LEWIS T. BAXTER, *Clerk.*

Circuit court of the United States, April term, anno Domini 1879.

Afterwards, to wit, at the same term before the Hon. John Baxter, the United States circuit judge, in the city of Nashville, comes the United States of America, by James A. Warder, their attorney, and says in the record and proceedings there is error in this: That the district court charged the jury that they would compute interest on the internal revenue taxes assessed and interest at the rate of six per cent. per annum, when it should have been at one per cent. a month; and the said United States pray that the
judgment of the district court, so far as it relates to interest, be re-
34 versed, overruled, and for naught held, and that they may be
restored to all the rights they have lost by reason of said ruling.

JAMES A. WARDEN,
U. S. Attorney.

Assignment of Error.

Circuit court of the United States for the middle district of Tennessee.

THE UNITED STATES
vs.
JOHN D. WRIGHT AND OTHERS.

At said time before the Hon. John Baxter, judge of said court, &c., came the defendants by N. Smithton, their attorney, and they say that in the record and proceedings aforesaid there is manifest error in this, to wit:

The district judge charged the jury on the trial in the court below that the endorsement made by Wright and Tucker upon the original report of survey therein referred to was a waiver of their right to a copy thereof,

and that defendants are liable for deficiencies in the production of spirits though they had no copy of the survey.

And the said defendants pray that the judgment aforesaid may be reversed, annulled, and for nothing held, and that they may be restored
35 to all the rights and things which they have lost by occasion of the said judgment.

N. SMITHSON,
Attorney for Pl'ff in Error.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campton, clerk of the district court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the cause of The United States vs. John D. Wright and others, as appears of record and from the original file still remaining in my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Nashville, this 10' day of April, 1879.

[SEAL OF U. S. DIST. COURT.] E. R. CAMPTON, *Clerk.*

On the 1' day of May, 1879, a judgment was entered in the circut court, which is as follows:

THE UNITED STATES
v.
JOHN D. WRIGHT, THOS. B. TUCKER, W. O. Bennett, and J. M. Bass, executor of W. H. Wells, dec'd.

36 This cause was this day heard by the Hon'l. John Baxter, circuit judge, &c., upon a transcript of the record from the district court of the United States for the middle district of Tennessee, and upon assignment of errors, both by the plaintiff and the defendants, and upon consideration thereof, it appears to the court that there is no error in the record, and that the several errors assigned by the plaintiff and defendants are not well assigned. It is therefore considered by the court that the judgment of the district court be in all things affirmed, and that the plaintiff, the United States, recover of the defendants, John S. Wright and Thomas B. Tucker as principals, and W. O. Bennett and J. M. Bass as the executors of the last will and testament of W. H. Wells, deceased, as their sureties, and of T. M. Bass and G. W. Bennett, the sureties on their bond for the writ of error, the sum of one thousand dollars, the debt in the declaration mentioned, which may be discharged upon the payment of the sum of seven hundred and seventy-one $\frac{92}{100}$ dollars, the damages heretofore assessed by the jury in the district court, together with the further sum of twenty-two $\frac{36}{100}$ dollars, making in the aggregate the sum
37 of seven hundred and ninety-three $\frac{43}{100}$ dollars, and the costs of this suit (except that named by the United States in their writ of error, which will be paid by the plaintiff), for all of which execution will issue, to be levied of the goods and chattels, lands and tenements, of the said John D. Wright, Thomas B. Tucker, W. O. Bennett, T. M. Bass,

and G. W. Bennett, and of the goods and chattels, rights and credits, of W. H. Wells, deceased, in the hands of said J. M. Bass as such executor, to be administered, if any there be.

On the 1' day of May, 1879, an order was entered, which is as follows:

THE UNITED STATES)
v.
JOHN D. WRIGHT ET AL.)

This day came the defendants and moved the court for a new trial, which motion is overruled. Thereupon the defendants moved the court to arrest the judgment heretofore rendered in this cause, which motion was also overruled.

On the 27th day of April, 1880, a bond for writ of error was filed, which is as follows:

38 JOHN D. WRIGHT, THOMAS B. TUCKER, W. O. Bennett, and J. M. Bass, executor of the last will and testament of W. H. Wells, dec'd, F. M. Bass, and G. W. Bennett, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANTS IN ERROR.

Know all men by these presents that we, John D. Wright, Thomas B. Tucker, W. O. Bennett, F. M. Bass, G. W. Bennett, and G. H. Harris, are held and firmly bound unto the United States in the penal sum of ($1,542.18) fifteen hundred and forty-two dollars and eighteen cents, to the payment of which, well and truly to be made, we, the said John D. Wright, Thomas B. Tucker, W. O. Bennett, F. M. Bass, G. W. Bennett, and G. H. Harris, bind ourselves, and each of us, jointly and severally, our and each of our heirs, executors, and administrators firmly by these presents, and for the payment of which I, the said J. M. Bass, as such executor, bind the assets of the said Wells (but do not bind myself personally or individually) firmly by these presents. Sealed with our seals and dated this the 5th day of April, 1880.

The conditions of this obligation are such that whereas the above bounden John D. Wright, Thomas B. Tucker, William O. Bennett,
39 J. M. Bass, as executor of the last will and testament of said W. H. Wells, dec'd, F. M. Bass and G. W. Bennett, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the middle district of Tennessee:

Now, therefore, if the said John D. Wright, Thomas B. Tucker, William O. Bennett, J. M. Bass, as such executor, F. M. Bass, and G. W. Bennett shall prosecute to effect their writ of error and answer the cost and damages if they fail to make good their plea, then this obligation

shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN D. WRIGHT, [SEAL.]
By N. SMITHSON, *Att'y.*
J. M. BASS, [SEAL.]
Executor W. H. Wells, dec'd.
T. B. TUCKER. [SEAL.]
W. O. BENNETT. [SEAL.]
F. M. BASS. [SEAL.]
G. W. BENNETT. [SEAL.]
G. H. HARRIS. [SEAL.]

Approved and accepted April 27th, 1880.

JNO. BAXTER,
Judge, &c.

40 MIDDLE DISTRICT OF TENNESSEE:

I, Lewis T. Baxter, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the cause therein lately determined, wherein the United States were plaintiffs and John D. Wright and others were defendants, as appears from the records and the papers on file in my office.

Witness my hand and the seal of said court at Nashville, in said district, this the 27th day of April, A. D. 1880.

[SEAL.] LEWIS T. BAXTER, *Clk.*

Rec'd of Noble Smithson, att'y for defendants, nine $\frac{20}{100}$ dollars in full, for making out transcript, issuing writ of error, &c.

LEWIS T. BAXTER, *Clk.*

(Indorsement on cover:) No. 227. John D. Wright, Thomas B. Tucker, W. O. Bennett, J. M. Bass, executor of W. H. Wells, deceased, F. M. Bass, and G. W. Bennett, plaintiffs in error, vs. The United States. M. Tennessee, C. C. U. S. Filed 27th May, 1880.

3701——2

SUPREME COURT U.S.
FILED
MAR 30 1883
JAMES H. McKENNEY, Clerk.

108-281

JOHN D. WRIGHT, et. al, *Plaintiffs in Error.*
vs.
The UNITED STATES, *Defendants in Error.*

FOR PLAINTIFFS IN ERROR.

Economical Print, cor. Union & College, over Marr's Bank.

JOHN D. WRIGHT, et al, Plaintiffs in Error.
vs.
The UNITED STATES, Defendants in Error.

FOR PLAINTIFFS IN ERROR.

THE CASE.

This is, in substance, an action of covenant upon the bond of plaintiffs, WRIGHT and TUCKER as distillers. The bond is in the usual form.

The breach assigned is that:

"They failed to pay certain assessments made against them, as distillers, by the assessor of said collection district on the March and June lists, 1874, for *deficiencies* in the months of November and December, 1873, amounting in the aggregate to the sum of $607.49." R. p. (Declaration.)

The Plaintiffs in error pleaded, among other pleas, that no copy of the survey of the distillery was ever delivered to them or either of them as required by law, and that they were, therefore, not liable for the deficiencies, etc., mentioned in the declaration. R. p. (Sixth Plea).

The distillery of Wright and Tucker was surveyed by the proper revenue officer, April 3, 1873, when they executed the bond here sued upon. And on the 12th day of Sept. 1873, they

signed the following endorsement, written upon the original report of survey, to-wit:

"We hereby accept the within survey, and consider the same as binding upon us on and after this date. This September 12, 1873.

JOHN D. WRIGHT,
THOMAS B. TUCKER."

They signed this endorsement at the instance of J. H. Morris, the assistant assessor, who filed the same in the assessor's office. They did not read the report of survey so endorsed, nor know its contents, nor did they know at what capacity they were assessed. *No copy of said survey was ever delivered to them or either of them; nor did they ever have a copy thereof.* R. p. (Bill of Exception.)

The suit commenced in the District Court. On the first trial in that court judgment was rendered for Wright, et al. The United States took the case to the Circuit Court, where the judgment of the District Court was reversed and the cause remanded. On the second trial in the District Court the district judge adhered to his former opinion, but charged the jury in accordance with the opinion of the circuit judge, and a judgment was rendered for the United States. Wright et al. then took the case to the

ASSIGNMENT OF ERRORS.

The court erred in charging the jury that the endorsement on the report of the survey, to wit, "we hereby accept the within survey and consider the same as binding upon us on and after this date, September 12, 1873," was a waiver of the right of Wright and Tucker "to a copy thereof, and that the defendants are liable for deficiencies in the production of spirits, though they had no copy of the survey."—Rec., pp. 12, 14, 15.

spirits. Wright and Tucker did not read the survey, nor know its

contents, nor know at what capacity they were assessed; nor was any copy of the survey ever delivered to or received by them. R. p. 7 (Bill Exceptions.)

It is therefore clear that the plaintiffs in error are not liable unless they waived the delivery of a copy of the survey, that is to say unless they are bound because of their signing the endorsement on the original survey. *Peabody, collector, v. Stark* 16 *Wallace* 240.

The only evidence of a waiver is the endorsement on the survey above set forth. *Nothing is said, in said endosement, in regard to a copy; and there is certainly no express waiver of a copy.* The endorsement is as follows: "*We hereby accept the within survey and consider the same as binding upon us on and after this date.*" There is no doubt or uncertainty as to the meaning of this language. It plainly implies that the parties thereby admitted that the *survey* was correct, and that the capacity of the distillery was therein correctly estimated.

Plaintiffs in error had the right to appeal to the Commissioner of Internal Revunue for the correction of any error of the assessor in fixing the producing capacity of the distillery.

Collector v. Beggs 17 *Wallace* 182. *United States v. Singer* 15 *Wallace*. *United States v. Ferrary* 93 *U. S.* 675.

Morris, the assistant assessor, at whose instance this endorsement was signed, certainly knew this fact. His purpose in getting Wright and Tucker to sign the endorsement was to get their admission that the survey was correct, and that the producing capacity of their distillery was therein correctly fixed, and thereby preclude them from appealing to the Commissioner for a re-survey, or making any question thereafter as to it correctness. We think this is apparent from the language of the endorsement, and that this is the only reasonable or fair construction of it.

If it had been the intention of Morris, and the other parties, to waive *a copy* of the survey, they would certainly have said so in the endorsement.

What sense would there be in getting Wright and Tucker to *accept* a survey, and state that they considered it *binding* on them if this merely referred to the copy? When the survey was

made it was binding and conclusive upon them, without any endorsement on their part, unless they appealed to the Commissioner. The law fixed their liability whenever the survey was made, and a copy furnished, unless they appealed to the Commissioner. This was the only thing about which they had any choice or option. To preclude this appeal, and settle all questions as to the correctness of the survey, Morris the assistant assessor procured Wright and Tucker to sign the endorsement referred to.

We, therefore, insist that there was no waiver of a copy of the survey; nor any thing in the endorsement referred to making plaintiffs in error liable for deficiences in the production of distilled spirits. Peabody, collector, *v.* Stark 16 Wall. 240.

The judgment should be reversed and the cause remanded for another trial.

R McP Smith
for Plff

SUPREME COURT, U.S.
FILED
MAR 30 1883
JAMES R. MCKENNEY, CLERK

108-281

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

JOHN D. WRIGHT, THOMAS B. TUCKER, and others,
vs.
THE UNITED STATES.
No. 227.

BRIEF FOR THE UNITED STATES.

11179

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

JOHN D. WRIGHT, THOMAS B. TUCKER, and others, *vs.* THE UNITED STATES. } No. 227.

BRIEF FOR THE UNITED STATES.

This is an action on a distillers' bond to recover the difference between the capacity tax and the tax calculated on the actual return of the distillers.

The defense was that the action would not lie because no copy of the official survey had been served on the defendants, Wright & Tucker, the distillers; but the evidence showed that on the day the bond was executed the distillers, at the instance of one Morriss, an assistant assessor of internal revenue, signed the following indorsement on the official survey, namely, "We hereby accept the within survey, and consider the same as binding upon us on and after this date, this Sept. 12, 1873." There

was, also, evidence tending to show that neither Wright nor Tucker read the said survey or knew its contents.

In this state of facts the district court instructed the jury that the said indorsement amounted to a waiver of the right to a copy of the official survey, and that the defendants were liable for the tax demanded. To this ruling the defendants excepted.

The court also gave an instruction as to the amount of interest recoverable by the Government, to which the Government excepted.

There was a verdict for the United States, and judgment accordingly.

The case was carried to the circuit court on a writ of error *sued out by the United States alone*, but *the defendants, as well as the United States, assigned errors in the court of error*. (R. pp. 14, 15.)

The circuit court, taking cognizance of both assignments of error, affirmed the judgment of the district court "in all things."

NO JURISDICTION.

This court has no jurisdiction. Owing to the failure of the defendants to sue out a writ of error from the circuit court to the district court the judgment of affirmance by the circuit court as to errors complained of by the defendants was a *nullity*. The writ of error was indispensable to give the circuit court jurisdiction over so much of the judgment of the district court as aggrieved the defendants.

It follows then that there was no judgment reviewable here on a writ of error at the suit of the defendants below.

ON THE MERITS.

The instruction of the court below that the indorsement on the official survey was a waiver of the right to be served with a copy of the survey was plainly right.

One of two things is true, namely, that this indorsement was a waiver, or it was a fraud on the revenue.

The defendants must, it would seem, be estopped by their act, and cannot now set up their ignorance to the disadvantage of the Government.

This view is not in conflict with Peabody *v.* Starke (16 Wall., 240), which we understand to rule merely that the distiller must have an official notification of the survey.

It is submitted that the writ of error must be dismissed, or, failing that, the judgment affirmed.

WM. A. MAURY,
Assistant Attorney-General.